Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 217

THE GREAT WESTERN MINING & MANUFACTURING COMPANY, by L. C. BLACK, its Receiver, *Petitioner*,

vs.

CHARLES A. HARRIS et al., Executors of B. D. HARRIS, Deceased, *Respondents*.

BRIEF ON BEHALF OF THE PETITIONER

STATEMENT OF THE CASE.

---

(1) What the Circuit Court of Appeals Decided.

The Circuit Court of Appeals for the Second Circuit decided in this case:

1st. That the United States Circuit Court for the District of Vermont had no jurisdiction of a suit brought by The Great Western Mining & Manufacturing Company, a Kentucky corporation, by its receiver against a citizen and resident of Vermont under the direction and authority of the United States Circuit Court for the District of Kentucky; and,

2d. That, even if the court had jurisdiction of the suit, no right of action was vested in the corporation to recover $75,000 of the funds of the company, which the directors and officers had secretly and fraudulently misappropriated to their own use, but that such right of action was vested in the creditors, or the receiver as representing the creditors. (Rec. 387-400.)

The case below is reported as Great Western Mining & Mfg. Co. vs. Harris' Estate, 111 Fed. 38; S. C. 128, Fed. 321.

(2) The Suit.

This suit was brought by The Great Western Mining & Manufacturing Company by L. C. Black, its receiver, in the United States Circuit Court for the District of Vermont under the direction of the United States Circuit Court for the District of Kentucky, by which court the receiver was appointed, September, 1892, in a general creditors' and foreclosure suit. (Rec. 178, 179; Exs. 107-A, 109; Rec. pp. 364-367.)

The suit was against B. D. Harris, formerly the president and a director and one of the largest stockholders of the company. It was sought by the bill to charge him as a director and officer of the company, for the fraudulent misappropriation of $75,000 of its funds to his own use and that of his co-directors, and also for other acts of malfeasance and negligence. (Rec. 1-7.)

(3) The Great Western Mining and Manufacturing Company.

The Great Western Mining and Manufacturing Company was a corporation organized in 1856 under the laws of the State of Kentucky for the purpose of mining coal. Its authorized capital was $3,000,000, divided into thirty thousand shares of $100.00 each. Prior to 1888 and 1889 only $200,-

000 of this stock represented by 2000 shares had been issued. 28,000 shares representing $2,800,000 was treasury stock.

The outstanding stock was owned as follows:

B. D. Harris (president and director)	600 shares.
G. D. Harris (director)	600 shares.
John Carlisle (secretary, treasurer and director)	440 shares.
George W. Carlisle (director)	300 shares.
Geo. W. Richardson (vice-president and director)	52 shares.
Jas. C. Holden (director)	4 shares.
Loring Hinsdale (director)	4 shares.
Total	2,000 shares.

(Exhibit 106, Rec. pp. 297, 338; Exhibit 2, Rec. p. 208; Exhibit 10, Rec. p. 214; Ex. 15, Rec. p. 219-220.) From 1883 to 1889 these gentlemen had filled these positions, and had operated the company, whose business was the mining of coal.

The mines of the company had been operated to a limited extent prior to the War. Their operation, however, had not proved either expedient or profitable, and they were abandoned and became dilapidated. (Rec. 50, 64, 66, 93-95; Ex. 106, Rec. p. 297, 301, 306, 321.)

In anticipation, however, of the completion of a railroad to the mines in 1881, the stockholders of the Company at that time, who, besides John and George W. Carlisle, consisted of R. B. Bowler, S. K. Shoenberger and Larz Anderson, had advanced, prior to 1883, to the Company for the purpose of opening up the old mines and other improvements about $56,773.20. Despite the building of the railroad, the operation of the mines was still unsuccessful and they steadily lost money.

(Ex. 2, Rec. 209; Rec. 35-40, 57-60, 64-66, 93-98; Ex. 106, Rec. 323, 329, 332, 333, 335.)

The stockholders, other than the Carlisles, were not pre-

pared to advance any more funds on a losing venture. Therefore on November 15, 1883, B. D. Harris and Geo. D. Harris bought out the interests of Bowler, Shoenberger and Anderson and became the owners each of 600 shares of stock for which they paid $30.00 per share or $18,000.00 each.

(Rec. 57, 59; Ex. 106, Rec. p. 331, 334, 335, 336.)

(4) The History of the Property from 1883 to 1889.

Upon the reorganization of the Company by the coming in of B. D. Harris and G. D. Harris, a mortgage of $60,000.00 was at once placed upon the property. (Rec. 68; Ex. 2, Rec. 209.) New mines were opened from time to time and the old ones abandoned as they were exhausted and became valueless. (Rec. 35-40, 59, 91, 93-94, 97, 98, 158-160, 162-165; Ex. 100, Rec. 336, 339, 343.)

The investment represented by the old mines thus became worthless to a great extent.

There is attached to the evidence of John Carlisle as Exhibit 2 a paper which is an original copy of the financial history of this Company from 1883 to 1889. After much hesitation John Carlisle, Secretary and Treasurer of the Company, finally admitted that it was prepared by himself for the benefit of his co-directors and stockholders, at the time of the increase of the stock and the floating of $300,000 of bonds, and that its contents were familiar to all of them. (Ex. 2, Rec. 208-212; Rec. 61-77.) From this statement it appears that the company year by year became more involved and by December 31st, 1888, was hopelessly indebted to the amount of $131,585.03, consisting of

Floating indebtedness	$91,585.03
Bonded indebtedness	40,000.00
Total	$131,585.03

(Ex. 2, Rec. pp. 209-212; Rec. 68-76; Ex. 105, Rec. 296.)

(5) The Stock and Bond Issues.

It was this desperate condition of the company and the relations of the officers, directors and stockholders of the company to it that no doubt brought about the fraudulent transactions which are the subject of complaint in this suit. Not only were the Harrises and Carlisles in danger of losing their original investment in stock, but also their advances to the company, and in addition they were liable for their endorsement on the notes of the company.

Of the indebtedness which existed on January 1st, 1889, almost the entire amount was owing to the directors or they were individually responsible for it.

There was due	
To John Carlisle	$36,771.96
To John Carlisle	7,000.00
To John Carlisle	25,069.22
To Cheshire Savings Institution—Note $15,000, endorsed by directors	15,000.00
To O. C. Phelps—Note, $5,000, endorsed by directors	5,000.00
To G. S. Richardson, a director	775.30
To 21 bonds held by Harris and family	21,000.00
To 8 bonds, Carlisle	8,000.00
	$118,617.48

(R. Ex. 2, 212; Rec. 68, 69; Ex. 98, pp. 97-98.)

Such had been the condition of affairs as seen from Exhibit 2 for three or four years prior to 1889.

As early as 1887 the determination had been formed by the directors to issue $300,000 of bonds on the plant. The ostensible purpose of this was to provide additional capital to increase the output of the mines. It is so pleaded in the answer in this case, recited in the minutes of the company,

and represented to the brokers. The real purpose was, to get back the money the directors had directly or indirectly advanced to the company, to save themselves on their endorsements, and to get out their investments in worthless stock. Nothing but a fraud could accomplish such a purpose and they proceeded to perpetrate it. They all shared in it and had full knowledge of the entire transaction (Rec. 63, 112, 119, 121.)

To carry out their object the directors began to prepare as early as November, 1887 (Rec. 103, 112, 117).

On November 10, 1887, at a called meeting of the directors of the Great Western Mining and Mfg. Co., at which B. D. Harris, G. D. Harris, J. C. Holden and John Carlisle were present, Mr. Carlisle, secretary and treasurer of the company, "reported that the business at the mines was unusually good," * * * "and the only thing lacking was sufficient capital to enable the company to increase the output enough to meet the demand." He also reported: "That a large amount had been expended this year for permanent improvements out of the earnings of the company, the total for the past three years amounting to over $50,000." (Ex. 106, Rec. 344.)

A meeting of the stockholders was therefore authorized to be called on January 11th at Cincinnati "for the purpose of acting on an increase of the capital stock to the amount of $50,000, to be divided pro rata among the stockholders, being the amount of net earnings expended in permanent improvements." (Ex. 9, Rec. 213; Ex. 106, Rec. 344, Rec. 101-102.)

As a matter of fact, on their own showing (Ex. 2, Rec. 211-210), the earnings of the company for the

past four years (1884, 1885, 1886 and 1887) had amounted to only		$34,774.01
Interest, charges, dividends, etc., had been paid therefrom to the amount of	$23,876.21	
And interest had accumulated in favor of John Carlisle, which should have been paid in the sum of....	7,698.70	31,574.91
Net earnings		$3,199.10

Nevertheless, on January 11th, 1888, the stockholders met at Cincinnati and the following resolution was unanimously adopted by 1990 shares out of 2,000.

"Whereas, There has been expended for permanent improvements and betterments, including barges, flats, opening of new mines and machinery, etc., during the past three years, the amount of $64,666.44, all of which sum has been furnished from the net earnings of this company;

Resolved, That the stockholders being entitled to the amount the president and secretary be authorized and directed to issue five hundred shares of stock of this company to be divided pro rata among the stockholders of this company as follows:

To B. D. Harris, one hundred and fifty shares.
G. D. Harris, one hundred and fifty shares.
John Carlisle, one hundred and ten shares.
G. W. Carlisle, seventy-five shares.
George S. Richardson, thirteen shares.
James C. Holden, one share.
L. Hinsdale, one share."

(Rec. 102; Ex. 10, Rec. 213; Ex. 106, Rec. 344.)

This action of the stockholders was approved by the directors and the stock issued. (Rec. 102; Ex. 11, Rec. 214; Ex. 106, Rec. 345.)

(6) The Negotiations for the Sale of Bonds.

Meanwhile the issue of bonds or the securing of a loan on the property was being actively pushed. The directors

having themselves failed to accomplish anything, took up the matter with a man by the name of Vernon, who undertook to float a loan of $250,000. During the time he had it in charge Mr. Carlisle on August 11, 1888, wrote a letter to B. D. Harris at Brattleboro, Vermont, as follows:

"Hon. B. D. Harris,

Dear Sir: As I wrote you from New York, Mr. Vernon and I hurriedly prepared a new statement which he had type-written and forwarded to me to-day. Mr. Tyler and I went over the statement you sent together with Mr. Vernon's and made several alterations on the latter. I return herewith both to you to criticize, fix up and send to Mr. Vernon. He will have them type-written for us. Mr. Tyler is of the opinion the words 'necessary expenses and outlays' will cover as he expresses it 'a multitude of sins' and enable us to use the money received from sale of bonds, that is, what is left over and above paying the debts and working capital" (Rec. 125).

On August 16th, 1888, he wrote to G. D. Harris, the brother of B. D. Harris, a letter intended for both, as follows:

"Dear Sir:

Mr. Vernon is trying to place $250,000 of bonds of our Mining Co. for the purpose of retiring the $60,000 of 7 per cent. bonds that we now have, paying the floating debt of $50,000 which is now due, and enlarging our facilities for doing business by building more houses, a new store, a saw mill and furnishing property in Cincinnati where we can elevate our own coal, for which I am now paying about $1,000 a month, and enable us to retail coal here without paying tribute, then give us some capital to buy our supplies for cash. In this latter item, in elevating coal, we can almost save sufficient to pay the interest on $250,000. After all this is done I think there will be left sufficient to divide that will almost refund to us what our stock cost us, $70,000." (Rec. 125, 127, 129, 132, 134, 138, 195, 196, 199.)

These letters disclose the purpose which was animating the directors and officers of this company, viz., to raise funds on a loan and use them not only to pay back to themselves their

advances, but also from what was left over "to refund" the original cost of their stock to the amount of $70,000.00.

Vernon's efforts, however, appear to have been unsuccessful and were abandoned in the fall of 1888 or the early part of 1889. At that time Mr. Carlisle met a Mr. Scott, a representative of the firm of Elliott, Johnson & Co. of Wilmington, Delaware. Negotiations were opened with Elliott, Johnson & Co. to undertake the sale of the bonds which afterwards were successfully carried through. (Rec. 63, 103, 104, 126-137; Ex. 98, Rec. 271-292; Exs. 16-93, Rec. 233-265.)

They were conducted by John Carlisle as secretary and treasurer of the company on the part of the company and Henry P. Scott on the part of Elliott, Johnson & Co. (Rec. 11, 12, 19-24, 63, 103, 126-139; Ex. 98, Rec. 271-292.)

At the very beginning of these negotiations preparations were made to further increase and divide capital stock

On January 15th, 1889, at a special meeting of the directors, the following resolution appears on the minutes:

"It appearing that the item of Construction Account shows over $150,000.00 have been paid for improvements and betterments from the net earnings of the company, which amount properly belongs to the stockholders of this company it was, upon motion of Mr. Hinsdale,

"Resolved, That the attention of the stockholders at the next annual meeting be called to the fact of such appropriation of the net earnings with the request that they instruct this board what action to take."

"The Secretary reported that the President, B. D. Harris, and himself had conferred with Eastern capitalists on the subject of additional capital for the company and that they recommend the issuing of first mortgage bonds which could be sold at about eighty cents on the dollar." (Rec. 102: Ex. 12, Rec. 214; Ex. 106, Rec. 347.)

Negotiations continued. John Carlisle made several visits to see the brokers. He wrote them letters. B. D. Harris also wrote letters.

March 23d, 1889, Carlisle wrote to Elliott, Johnson & Co.:

"Will you kindly inform me what are the prospects for placing the bonds of the Great Western Mining and Mfg. Co., and when you will be able to send some one out to examine the property." . . . (Ex. 68, Rec. 255.)

April 1st, 1889, he wrote:

"I feel confident of your ultimate success in placing our bonds if you will persevere, and that I am sure you would do if you saw the property.

"I expect to go East next week and will be glad to meet you in Philadelphia on Monday or Tuesday next. I might possibly assist you in starting the ball rolling. Yours truly,

John Carlisle."

(Ex. 70, Rec. 255.)

The same day, April 1st, 1889, he wrote to B. D. Harris:

"I enclose letter from Elliott, Johnson & Co. Although not encouraging I think there is a gleam of hope in it. I have written that I feel confident they would succeed if they persevere, and I know they would do that if they only saw the property. I said I would meet them in Philadelphia next Monday or Tuesday if they ask. Possibly I might help them start the ball rolling. I think now is the time to offer additional inducement either in giving stock or a guarantee to the one who subscribes the first $25,000.00." (Ex. 98, Rec. 272.)

April 5th, 1889, Elliott, Johnson & Co., wrote to Mr. Carlisle:

"Wilmington, Del., April 5, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

Dear Sir: Mr. Needles has called our attention to your letter to him. We are disposed to take up your matter and offer your bonds to our customers and believe if we do so we will succeed in placing them. If we agree to do so provided our experts' examination is satisfactory will you put the matter in our hands, absolutely, and take $255,000.00 less 2½ per cent. for the $300,000.00 bonds? Yours truly,

Elliott, Johnson & Co."

(Ex. 25, Rec. 236.)

April 6th, 1889, John Carlisle wrote to B. D. Harris:

"I am daily expecting a letter from Elliott, Johnson &Co. If it comes to-morrow and is favorable I will leave to-morrow for Philadelphia. If I do I will wire you." (Ex. 98, Rec. 273.)

(7) The Agreement.

The expected letter came. Mr. Carlisle met Mr. Scott, of Elliott, Johnson & Co., and came to a verbal agreement with him as to the terms upon which the loan should be floated. This agreement was never formally embodied in any written instrument, but appears from the following correspondence:

(John Carlisle to B. D. Harris.)

"Cincinnati, April 13th, 1889.

In my hurried letter yesterday I do not know that I made matters plain. It is this: Messrs. Elliott, Johnson & Co. about one year since placed with the aid of Fisk, Hatch & Co. of New York, the bonds of the Shawnee Coal Co. of this city, who are mining two thousand tons per day. The bonds were sold at a discount, but were sugared with an even amount of stock dollar for dollar. They were confident if we would agree to this that they alone could float the loan. That would mean doubling our stock to which I strongly objected. At last I agreed subject to your approval to increase the capital stock to $350,000.00 or $400,000.00 and give $150,000.00 of stock with the bonds." (Ex. 98, Rec. 273.)

(John Carlisle to Elliott, Johnson & Co.)

"April 16, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

Gentlemen: . . . I wish you would kindly write me your proposition as we talked when I was with you in Wilmington last Friday, so that I can submit it formally to our board at their annual meeting on the 22d. Yours truly,

John Carlisle"

(Exhibit 73, Rec. 256.)

(Elliott, Johnson & Co. to John Carlisle.)

"Wilmington, Del., April 18, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

Dear Sir: Your favor of the 16th received. We wrote you yesterday, which will cover what you request, but now restate that our plan is to undertake to float your bonds, provided the further examinations legal and engineering are favorable, without assuming any responsibility, so that the bonds with 50 per cent. of the Great Western Mining & Mfg. Co.'s capital stock, as a bonus, will net you 85 per cent.

Yours truly,

Elliott, Johnson & Co."

(Ex. 16, Rec. 233.)

(John Carlisle to Elliott, Johnson & Co.):

"April 27, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

Gentlemen: At the meeting of the directors of the Great Western Mining & Mfg. Co., held on the 22d inst., your proposition, embodied in your letter of the 18th inst., undertaking to float the bonds of this company, so that the same should net the company eighty-five per cent. of the par value thereof, providing fifty per cent. of the par value of the bonds in the stock of the company should also be transferred with said bonds; and also provided that the results of further examination are favorable, was presented and accepted, and the secretary was directed to notify you of such action of the directors.

This gives you the exclusive authority to negotiate the sale of the bonds of the company. Very truly yours,

John Carlisle, Sec., etc."

(Ex. 79, Rec. 259.)

(B. D. Harris to John Carlisle):

"Brattleboro, Vt., June 3, 1889.

John Carlisle, Esq.

Dear Sir: . . . It was no part of our original plans with Elliott & Co. that we should engage in this business, and did not enter at all in our arrangement with them. Our plan was to sell $300,000.00 bonds with a bonus of $150,000.00,

stock outright and positively for the net sum of $255,000.00, and not buy at all. . . . Very truly yours,
B. D. Harris."

(Ex. 98, Rec. 280.)

The testimony of Carlisle & Scott does not in its essential features contradict this written record of the agreement (H. P. Scott, Rec. 19-24; John Carlisle, 118, 119, 103-105). Elliott, Johnson & Co. were thus given the privilege of buying from the company $300,000 of bonds for $255,000, to be accompanied by $150,000 of bonus stock. This was the first time a price had been fixed on the bonds.

For some inexplicable reason the lower courts seem to have fallen into two serious errors on the facts: (1) That the bonds could not be sold for 60 cents without stock, but only for 85 cents with the stock (Rec. 392). There is no evidence whatever of this or that it was attempted. (2) That the company had no treasury stock and in order to sell the bonds had to get it from stockholders (Rec. 398). There was $2,750,000 treasury stock on hand when the agreement was made by the company to sell the bonds at 85 cents with a stock bonus.

(8) The Fraud.

As stated in Carlisle's letter to Elliott, Johnson & Co., of April 27, 1889, the meetings of the above named stockholders and directors of the company were held on April 22, 1889. At the meeting of the stockholders the loan of $300,000.00 was authorized. The capital stock was also increased to $350,000, but instead of directing that the increase should be issued as bonus stock, as agreed, the stockholders and directors proceeded to work a scheme to fraudulently misappropriate $75,000.00 of the loan. They had been contemplating such a course for some time as before stated.

August 14, 1888, John Carlisle had written to B. D. Harris, relative to the bond issue.

"Mr. Tyler is of the opinion the words 'necessary expenses and outlays' will cover as he expresses it 'a multitude of sins' and enable us to use the money received from sale of bonds, that is, what is left over and above paying the debts and working capital." (Rec. 125.)

On August 16, 1888, he had written to G. D. Harris, the brother of B. D. Harris, a letter intended for both, in which apropos of the use of funds derived from the sale of the bonds he had said:

"After all this is done I think there will be left sufficient to divide that will almost refund to us what our stock cost us, $70,000." (Rec. 125, 127, 129, 132, 134, 138.)

And B. D. Harris in a letter to John Carlisle, April 27, 1889, referred to the matter as "our one chance." (Ex. 98, Rec. 274.)

The resolution of the stockholders, passed April 22, 1889, to carry out the scheme of fraud was this:

"The attention of the stockholders being called to the large amount of net earnings being used for construction and betterments, the following resolution was presented, and, after consideration, was adopted, to-wit:

"Whereas, There has been expended for permanent improvements and betterments, including machinery, barges, flats, etc., during the years 1884, 1885, 1886, 1887 and 1888, more than $160,000.00, all of which sum has been furnished from the net earnings of the company, and fairly belongs to the stockholders of the company.

"Therefore, Resolved, That the directors of this company be and hereby are authorized and requested to direct the president and secretary of the company to issue one thousand shares of the capital stock of the company to be divided pro rata among the present stockholders of this company as follows:

To B. D. Harris	360 shares.
G. D. Harris	360 shares.
John Carlisle	220 shares.
G. W. Carlisle	150 shares.
George S. Richardson	26 shares.

James C. Holden ..... 2 shares.
L. Hinsdale ..... 2 shares."
(Rec. 102; Ex. 13, Rec. 216; Ex. 106, Rec. 348.)

On the same day, April 22, 1889, the directors, pursuant to the authority granted them at the stockholders' meeting, passed the following resolution:

"Ashland, Ky., April 22, 1889.

"A meeting of the newly elected directors of the Great Western Mining & Manufacturing Company was held this day, immediately after the adjournment of the stockholders' meeting.

* * * * * * * * * * *

"The following preamble and resolutions were presented, and, after full consideration, were unanimously adopted, to-wit:

"'Whereas, The Great Western Mining & Manufacturing Company of Kentucky has power under its charter to borrow money and issue bonds therefor, and secure payment of the same by the mortgage of all or part of the property of the company; and

"'Whereas, At a meeting of the stockholders of the said company, held on the 22d day of April, A. D. 1889, the directors were authorized and requested to negotiate a loan of three hundred thousand dollars ($300,000), and to issue bonds therefor, and to execute a deed of trust or mortgage to secure payment thereof, on all the property of said company; and

"'Whereas, It is desirable to more thoroughly develop and to largely increase the output of the mines at Peach Orchard, and such development can not be secured without additional capital for the opening of new mines, for the purchase of additional machinery and working plant, and for the increase of terminal facilities; therefore

"'(1) Resolved, That this company will issue three hundred (300) mortgage bonds of the denomination of one thousand dollars ($1,000) each, to mature in twenty (20) years from June 1, 1889, and to bear interest at the rate of six per cent. per annum, payable semi-annually, etc., etc.

* * * * * * * * * * *

"'(2) Resolved, That the payment of the three hundred

bonds aforesaid as they respectively mature, and of the interest as it semi-annually becomes due and payable, shall be secured by a first mortgage or deed of trust, conveying to the Mercantile Trust and Deposit Company of Baltimore, Md., all the property, real, personal and mixed, of the Great Western Mining & Manufacturing Company, etc., etc.

* * * * * * * * *

"'(3) Resolved, That said deed of trust shall provide for the creation of a sinking fund in 1894, etc., etc.

* * * * * * * * *

"'(4) Resolved, That the said deed of trust shall provide especially against the creation of any further mortgage debt, etc., etc.

* * * * * * * * * *

"'(5) Resolved, That the preparation of the bond and deed of trust, in conformity with the foregoing resolutions, shall be entrusted to John Carlisle, and that the same, when duly approved by B. D. Harris, resident, shall be executed, etc., etc.

* * * * * * * * * *

"'(6) Resolved, That the president and secretary of the company shall arrange for the sale of the three hundred (300) bonds aforesaid, in their discretion, at the best price obtainable, and the proceeds thereof shall be applied to the cancellation and retirement of sixty (60) first mortgage seven per cent. bonds, dated Jan. 1, 1884, now outstanding; also to the payment of all floating indebtedness incurred up to the date thereof, for material and construction, and the balance shall be used by the directors for the best material interests of the company.'" (Ex. 14, Rec. 217; Ex. 106, Rec. 349-351.)

This resolution had been submitted to Elliott, Johnson & Co. by John Carlisle, April 15, 1889 (Ex. 72, Rec. 256), and returned by Elliott, Johnson & Co. to John Carlisle, April 17, 1889, in a letter in which they had stated that "also other resolutions should be passed covering the issuance of stock and the fifty per cent. bonus." (Ex. 18, Rec. 233.)

The directors at the same meeting, April 22, 1889, passed also this resolution:

"Whereas, at the annual meeting of the stockholders of

this company, a resolution was adopted requesting the directors to issue additional capital stock of this company to the amount of $100,000.00 to be divided pro rata among the present stockholders and based upon the fact that during the last five years more than $160,000.00 of the net earnings of the company have been expended for permanent improvements and betterments, thereby adding that amount to the assets of the company which belong to the stockholders of the company.

"Therefore, Resolved, That the president and secretary of this company are hereby directed to issue one thousand shares of the capital stock of the company to the present stockholders in proportion to the amount of stock already owned by them respectively, and that they furnish certificates of such stock as follows:

To B. D. Harris .....300 shares.
G. D. Harris .....300 shares.
John Carlisle .....220 shares.
G. W. Carlisle .....150 shares.
Geo. S. Richardson ..... 26 shares.
James C. Holden ..... 2 shares.
Loring Hinsdale ..... 2 shares."

(Ex. 14, Rec. 218; Ex. 106, Rec. 351; Rec. 102, 103, 110, 111).

This action was reported to Elliott, Johnson & Co. as follows:

(John Carlisle to Elliott, Johnson & Co., April 27, 1889.)
(Ex. 80, Rec. 258).

"Messrs. Elliott, Johnson & Co.,
Wilmington, Del.,

"Gentlemen: . . . I enclose herewith an official formal acceptance of your proposition.

"At our meeting of the 22d inst. we increased the capital stock to $350,000. . . .

Yours truly,
John Carlisle."

The recitals supposed to justify the distribution of this stock among these directors and officers as stockholders were absolutely untrue. Net earnings had not gone into better-

ments between 1883 and 1889. The history of the financial condition of this company between those years (Ex. 2, Rec. 209-212) prepared by John Carlisle for the information of the stockholders and directors at this very time shows this fact beyond question. (Ex. 2, Rec. 209-202, 67-76).

The earnings of the company from 1883 to 1889, although every possible expense had been charged to construction account instead of operating expense (Letter, John Carlisle to B. D. Harris, Feb. 2, 1888, Ex. 98, Rec. 271) were by their own statement as follows: (Ex. 2, Rec. 209-212).

1884	$2,669.34
1885	4,503.19
1886	6,021.81
1887	21,579.67
1888	30,610.95
Total	$65,384.96

These earnings, however, simply represented the difference between the amount received from the operation of the mines and store and the expenses of such operation (Rec. 69). Dividends, interest and other fixed charges were not deducted as should have been to reach the actual net earnings. These were as follows according to Exhibit 2:

1885	Dividends paid	$4,000.00
	Interest paid	3,490.00
	" "	4,651.72
	" "	1,122.29
1886	" "	3,490.00
	" "	3,632.20
1887	" "	3,490.00
1888	" "	3,046.99
	Interest	3,490.00
	Dividends	4,500.00
1889	Dividend Jan. 1st	1,500.00
		$36,413.20

In addition there were paid to John Carlisle in 1887, $11,543.96, and in 1888, $12,497.55, which sums included interest. Interest was also allowed to accumulate and turned into principal notes to John Carlisle as follows:

1885	$4,651.71	
1887	3,046.99	$7,698.70
		$44,111.90
Deduct from earnings		$65,384.96
Fixed charges, dividends & interest		44,111.90
Actual net earnings		$21,273.06

John Carlisle also testifies that there was due to him for commissions for 1888 and 1889, $8,799.80, which had been omitted (Rec. 115).

On April 27, 1889, the day Carlisle sent the formal acceptance of the Company to the proposition of Elliott, Johnson & Co., to float the bonds with fifty per cent. of the stock as a bonus so that the same should net the company eighty-five per cent. of the par value thereof, and told them the capital stock had been increased for that purpose, he wrote this letter to B. D. Harris, the defendant in this case.

(John Carlisle to B. D. Harris):

"April 27, 1889.

"I have yours of the 24th. I enclose letter received to-day from Elliott, Johnson & Co. with a copy of my formal acceptance of their proposition. I believe they can do much better, if not hampered with conditions.

"I also enclose a proposition of the stockholders which Mr. Tyler carefully prepared so that we could legally take the $75,000.00." (Ex. 98, Rec. 274.)

The proposition of the stockholders, which was enclosed, is as follows:

Proposition of Stockholders of The Great Western Mining & Manufacturing Company to the Directors of said Company.

"Whereas, The directors of the Great Western Mining & Manufacturing Company have taken steps to borrow the sum of $300,000.00 to be used in payment of existing indebtedness of the company and to provide additional working capital, etc., and have authorized the president and secretary to execute bonds for said amount, and to negotiate the same at the best price obtainable;

"And Whereas, We are informed that it will probably be possible to find purchasers for said bonds at the price of eighty-five per cent. of the par value thereof, provided that stock of the company, to the extent of fifty per cent. of the par value of the said bonds, shall also be transferred to the several purchasers of said bonds:

"And Whereas, It is deemed to be inexpedient to issue any new stock of the company for such purpose; and desiring to do all we can to assist the directors in procuring said loan and the sale of said bonds:

"We therefore make this proposition to the directors of the company in reference to the sale of stock held by us in said company, to the purchasers of the said bonds, to-wit:

"We will sell to the several purchasers of said bonds of the company, stock of the company belonging to us, in the amounts set opposite to our names respectively, and will furnish to the secretary of the company certificates of said stock, assigned in blank, to be by him delivered to said purchasers of said bonds, upon the understanding and agreement, that we are to receive the sum of $50.00 for each share of stock so sold by us, out of the money paid for said bonds and said secretary shall act as our agent in receiving said amounts, and shall pay us the same, before the company shall be entitled to have the remainder of the money paid for said bonds by the purchasers thereof.

"This action is not to be construed as a proposition to sell said stock to the company, but it is to be treated and regarded as a sale of stock directly to the purchasers of said bonds, to

be paid for by them to us, and the payment by them to the secretary of this company, for said bonds, shall be regarded as a payment to us for said stock, to the extent necessary to pay us therefor upon the terms above stated.

"In testimony whereof we have hereunto set our hands, on this third day of May, 1889.

B. D. Harris	450 shares.
G. D. Harris	450 shares.
John Carlisle	336 shares.
Geo. S. Richardson	39 shares.
G. W. Carlisle	225 shares.
Total	1,500 shares."

It was signed by all the stockholders, except Hinsdale and Holden, submitted to themselves, as directors, and agreed to on May 13, 1889, long after the contract to sell the bonds with the bonus of stock so as to net the company eighty-five cents on the dollar had been made (Ex. 93, Rec. 264; Ex. 106, Rec. 352, 353).

It is needless to say that it was not communicated to Elliott, Johnson & Co., or to any one else. It was studiously and intentionally concealed. Neither they nor any purchaser of bonds and bonus stock, although the Circuit Court of Appeals in its opinion suggests that no one was deceived, knew of it until 1894, when L. C. Black, the receiver, discovered it from the books and records of the company. The evidence on this point is uncontradicted. (Rec. 111, 19-24, 29-36; Ex. 108, Rec. 365.) What is more, contrary to the statement in the opinion of the Circuit Court of Appeals, the bill expressly charges: "That the matters and things set forth in this bill were not discovered until the month of March, A. D. 1894, when the said receiver examined the books and papers of said company, and that said discovery was not before made for the reason that said defendant, and the other said directors and stockholders of said company remained in charge of said company, its books and papers, until the appointment of the

receiver, as herein mentioned." (Rec. 7.) The answer does not deny this allegation.

(9) The Result.

Elliott, Johnson & Co. proceeded in good faith to take the bonds with the bonus of stock, according to their contract. The entire issue of bonds was turned over to them. As they sold the bonds they accounted to the company for 85 per cent. of the face value thereof, beginning June 3, 1889, and gave the names of the persons to whom the supposed bonus stock at the rate of fifty cents of stock for each dollar of bonds sold should be issued by the company. (Ex. 41, 42, 43, 31, 32, 33, 36, 37, 40, 46, 47, 49, 50, 55, 61, 62, Rec. 244, 245, 240-243, 246-250, 252; Rec. 130, 131.)

John Carlisle, who was secretary and treasurer of the company at Cincinnati, upon receipt of their letters surrendered stock of his own or of his brother and issued new certificates in the names of the persons directed and forwarded them to Elliott, Johnson & Co. Later the matter was equalized by the Harrises and Richardson surrendering their quota of stock to Carlisle. (Rec. 130-131; Ex. 15, Rec. 219-229.)

After these new bondholders and stockholders had thus been brought into the company, and by January 11th, 1890, Carlisle as treasurer of the company paid out of the proceeds of the bonds remitted to him, unknown to those thus brought into the company, in accordance with the secret plan of the stockholders and directors, the $75,000.00 as follows:

B. D. Harris	$22,500.00
G. D. Harris	22,500.00
John Carlisle	16,800.00
G. W. Carlisle	11,250.00
Geo. S. Richardson	1,950.00
	$75,000.00

(Rec. 116, 130-131; Ex. 98, Rec. 286.)

The result of the transaction as shown by the books of the company under date of April 1, 1890, is as follows, ignoring accrued interest:

Dr.

Proceeds of sale of bonds at 85 cents	$255,000.00
	$255,000.00

Cr.

Bond expense—Prof. Weatherby's Fee	$350.00
Bond expense—Mercantile Trust Co.	300.00
Bond expense—H. B. Huey, attorney	100.00
Bond expense—Notary	4.00
Bond expense—Registering bonds	60.00
Bond expense—Lithographing	196.00
Bond expense—Blue print maps	10.00
Bond expense—E. Vernon, drawing papers, etc.	480.00
Bond expense—Printing	20.00
Bond expense—Printing	91.00
Bond expense—R. Tyler, attorney	250.00
Bond expense—Telegrams	5.00
Bond expense—Traveling expenses	500.00
Bond expense—Returned to stock holders 1,500 shares of stock to issue to new bondholders as per agreement, May 3, 1889	75,000.00
First mortgage bonds	60,000.00
John Carlisle, balance due Jan. 1, 1889, and int. 1 year	5,416.37
John Carlisle, treasurer, balance due Jan. 1, 1889, and int. 1 year	21,156.57
John Carlisle, 1st note	12,720.00
John Carlisle, 2d note	12,000.00
John Carlisle, 3d note	12,771.06
John Carlisle, 4th note	7,000.00

John Carlisle, interest on said notes .. 3,392.61
John Carlisle, commissions 8,779.50

Total $220,603.01

Balance left $34,396.99

(Rec. 113-116; Exs. 94, 95, 96, Rec. 266-270.)

$34,396.99 was all that was left out of $255,000.00 after paying the $60,000 of old mortgage bonds, the expenses of issuing the bonds, the $75,000.00 misappropriated by the directors, and the claims of John Carlisle.

Three years afterwards, September, 1892, a receiver was appointed. Claims were filed and allowed by the United States Circuit Court for the District of Kentucky as follows:

Unsecured floating debt $96,650.91
Bonded indebtedness with interest 318,675.00

$415,325.91

The entire assets of the company sold for the following:

Mines, real estate, improvements. $70,000.00
Goods in store 5,666.67

Total realized $75,666.67

This indebtedness largely, if not entirely, had accumulated between 1889 and the failure of the company in September, 1892. (Rec. 148; Ex. 107; Ex. 110, Rec. 367-372; Ex. 111, Rec. 373-377; Ex. 112, Rec. 377-378; Ex. 113, Rec. 379-385.)

Up to the failure of the company, in September, 1892 and thereafter, B. D. Harris, his brother, G. D. Harris, John Carlisle, his brother, Geo. W. Carlisle, Geo. S. Richardson, Loring Hinsdale and James C. Holden, who had perpetrated this fraud, continued to be the directors and officers of the company in charge of its affairs, as they had been in 1885 to 1889. (Ex. 106, Rec. 353-362.)

(10) The Holdings of the Courts Below.

The Circuit Court for the District of Vermont found that the estate of B. D. Harris, he having meanwhile died, was liable to account for $15,000.00 being the amount abstracted by Harris from the company in exchange for the three hundred shares of stock issued to himself in April, 1889, at the time the loan was floated; but held that his estate was not liable for the remainder of the $22,500.00, or $7,500.00 taken by him in exchange for stock issued to him in January, 1888; and also held that his estate was not liable to account for the remainder of the $52,500.00 taken by the other officers and directors and stockholders with his connivance and consent. The court seemed to think that had the Harrises and Carlisles legitimately owned the stock, the transaction would have been perfectly regular, whereas had the stock been really their own, it would have been a fraud on the company to have applied it to such a use with such a purpose, since even such a sale to the company under such circumstances and with $2,750,000 treasury stock on hand would have been a dishonest bargain for the directors to have made. (Rec. 185-191, 111 Fed. 38.)

On cross appeals to the United States Circuit Court of Appeals for the Second Circuit, the appeal of the Harris estate was allowed, and the decree of the court below reversed with instructions to dismiss the bill on two grounds:

1st. That the United States Circuit Court for the District of Vermont had no jurisdiction of the suit brought by The Great Western Mining & Manufacturing Company by its receiver;

2d. That even if the court had jurisdiction, the suit could not be maintained either by the corporation or on its behalf, because all the stockholders interested in the company at the time of the distribution of stock in April, 1889, and the sale thereof at fifty cents on the dollar under the proposition to

the directors of May 3, 1889, had assented thereto except Holden. (Rec. 386-400, 128 Fed. 321.)

ARGUMENT.

FIRST POINT.

The United States Circuit Court for the District of Vermont had jurisdiction of the Suit.

The United States Circuit Court of Appeals upon the question of jurisdiction cited the following cases:

Booth vs. Clark, 17 How. 322.
Hale vs. Allison, 188 U. S. 56.
Evans vs. Nellis, 187 U. S. 271.
Finney vs. Guy, 189 U. S. 335.
Hilliker vs. Hale, 117 Fed. 220.

Booth vs. Clark decides that a receiver appointed in a creditor's suit in New York seeking to subject choses in action of his debtor to the payment of a judgment could not maintain a suit in his own name as against an assignee in bankruptcy in the Circuit Court for the District of Columbia to subject a fund arising from a claim against Mexico to the payment of the judgment.

Hale vs. Allison, Finney vs. Guy and Hilliker vs. Hale decide that a receiver appointed by a Minnesota Court in a suit brought by creditors to enforce the statutory double liability of stockholders could not maintain a suit as receiver in a foreign jurisdiction, the fund when recovered not being assets of the corporation and such an action not being maintainable even in Minnesota.

In Evans vs. Nellis it was held that under the statutes of Kansas, as interpreted by the Supreme Court of that State, the receiver could bring an action only against the corporation and all the resident stockholders to collect the statutory liability of stockholders for the benefit of all creditors, and

therefore such receiver could not maintain an action in a Circuit Court of the United States in a foreign jurisdiction against an individual stockholder for the amount of the statutory liability.

In short these cases simply decide, at the utmost, that an ordinary receiver in whom no title has vested appointed by a court of one state can not maintain a suit in a court of another state, in his own name, to recover assets or to enforce the double liability of stockholders.

But the Circuit Court of Appeals for the Second Circuit went much further. It said:

"We think these considerations apply with equal force to the right of the receiver to maintain this suit in the name of the corporation. * * * But if said court can not send such an agent outside of its territorial limits to collect moneys as receiver, its attempt to exercise extra territorial powers, by directing such agent to proceed in the name of the corporation, must be equally futile except where the court by statute, or otherwise, is empowered to vest title in the receiver, or where the corporation or the court acting within its powers on behalf of the corporation, or as the successor of its officers, has authorized such act. Hilliker vs. Hale, supra, Great Western Telegraph Co. vs. Purdy (162 U. S. 329)."

But is not the court in collecting the assets of a corporation acting within its powers on behalf of the corporation, or as the successor of the officers of the corporation in directing suit to be brought by it and in its name?

When the United States Circuit Court for the District of Kentucky appointed a receiver of The Great Western Mining and Manufacturing Company, and by that act assumed charge of the assets and affairs of the corporation, did it not take the place and could it not exercise the powers of the directors? Did it have to consult the directors or ask their permission to bring a suit for the corporation? Could the court not execute any corporate function or direct any act

to be done for a corporate purpose that the directors could have done or directed to be done?

This court has repeatedly so held as to "a call or assessment" on stockholders for the unpaid portion of the subscription price of stock.

Scovill vs. Thayer, 105 U. S. 143, 155.

Hawkins vs. Glenn, 131 U. S. 319, 329, 335.

Glenn vs. Marbury, 145 U. S. 499, 510.

In Great Western Telegraph Co. vs. Purdy, 162 U. S. 329, 336, this court said:

"The order of that court was in effect, as it was in terms, simply a 'call or assessment' upon all stockholders who had not paid for their shares in full. It was such as the directors might have made before the appointment of a receiver; and in making it the court, having by that appointment assumed charge of the assets and affairs of the corporation, took the place and exercised the office of the directors. Scovill vs. Thayer, 105 U. S. 143, 155; Hawkins vs. Glenn, 131 U. S. 319, 329; Lamb vs. Lamb, 6 Bissell, 420, 424; Glenn vs. Saxton, 68 California, 353; Great Western Tel. Co. vs. Gray, 122 Illinois, 630, 636, 640; Great Western Tel. Co. vs. Loewenthal, 154 Illinois, 261."

If the court can make an assessment in place of the directors it is submitted it can direct a suit to be brought by the corporation in a foreign jurisdiction and authorize its receiver to see that the suit is brought just as the directors might have done had the court not taken charge of the affairs of the corporation. In such a suit the corporation is the actor not the receiver, and is set in motion by the court instead of by its former directors.

That is precisely what was done in the case of Great Western Telegraph Co. vs. Purdy.

An ordinary receiver appointed by the Circuit Court of Cook County, Illinois, under the direction of that Court, brought an action in the name of the Great Western Telegraph Company, an Illinois corporation, by himself as re-

ceiver against Purdy, a citizen of Iowa, to recover a sum alleged to be due from him to the company on his subscription to its stock. The jurisdiction of the District Court of Des Moines, Iowa, where the suit was brought, was not called in question either in the State Courts or in this Court.

In Hayward vs. Leeson, 176 Mass., 310, the question has been fairly raised and decided in a case very similar to the case at bar.

In that case the receiver of the East Tennessee Land Company was appointed in a creditor's suit by the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee. On the authority of that court he instituted an action in the courts of Massachusetts in his own name to recover from directors and promoters secret profits made by them without full disclosure of the fact to the future stockholders about to be taken into the company. The Supreme Court of Massachusetts, while holding that the receiver could not bring the suit in his own name, said:

(Page 324): "The last objection made by the defendants is that the plaintiff, as receiver, can not bring the suit in his own name; and we think that this objection is well taken. . . . The plaintiff, as receiver, by virtue of these orders, has the powers usually conferred by a court of equity upon a receiver to preserve property pending litigation, and nothing more. Mr. Justice Gray, speaking for the Supreme Court of the United States of the powers of a receiver under a similar order, said: 'The utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property.' Union Bank of Chicago vs. Kansas City Bank, 136 U. S. 223, 236. That such a receiver can not sue in his own name to enforce a right of action of the corporation is settled. Wilken vs. Welch, 157, Mass. 77."

* * * * * * * * * *

(Page 326): "Upon substituting the East Tennessee Land Company as plaintiff in place of John K. Hayward" (the re-

ceiver), "the causes are to stand for hearing as to what the net profits are, which the defendants have respectively received, or as to what the damages are, which the plaintiff has suffered, as the plaintiff shall elect to proceed for the property or its proceeds on the one hand, or for damages on the other hand."

This case is referred to in Hale vs. Allison, 188 U. S. 56, 70. Nothing that is said in Hale vs. Allison is in any way at variance with the principle contended for. Conceding that L. C. Black, as Receiver, could not have maintained this suit in his own name, the corporation by him can do so, when the court having charge of the corporate affairs so directs.

This is true without any statutory provision, but it is certainly true in view of the Kentucky Statute.

Under the Kentucky Codes, Sec. 302. "The receiver has, under the control of the court, power to bring and defend actions, to take and keep possession of the property, to receive rents, collect debts and generally to do such acts respecting the property as the court may authorize."

SECOND POINT.

Even if the suit be treated as one brought by the Receiver in his own name, it is maintainable on the principle of comity.

As a general principle an ordinary receiver can not sue as a matter of right in his own name outside the jurisdiction of his appointment. By comity he may.

In Hale vs. Allison, 188 U. S. 56, 71, this court said that the principle of comity could not avail in a case brought in a foreign jurisdiction by a receiver in his own name, when the courts of the state in which the receiver was appointed hold that an action similar to the one brought in the foreign jurisdiction can not be maintained by him in the courts of the state of his appointment.

In Kentucky a receiver can bring an action in his own name. Kentucky Codes, Sec. 21.

L. C. Black as receiver could undoubtedly have maintained this suit in Kentucky in his own name. (Kentucky Codes, Secs. 21, 302.)

The State of Kentucky allows foreign receivers to sue in

The practice is entirely familiar to Courts of Chancery.

Thus in Taylor vs. Allen, 2 Atk. 213, Lord Chancellor Hardwicke appointed a receiver to collect the assets of a testator and empowered him to bring actions in the name of the executrix.

Pitt vs. Snowden, 3 Atk. 750.
Yeager vs. Wallace, 44 Penn. St. 291.
Merritt vs. Merritt, 16 Wend. 405, 410, 411.
Freeman vs. Winchester, 10 S. & M. (Miss.) 577, 580.
Green vs. Winter, 1 Johns. Ch. 60.

Lewis vs. American Naval Stores Co. 119 Fed. 396, 397.
Metzner vs. Bauer, 98 Ind. 425.
Boulware vs. Davis, 90 Ala. 207.
Cooke vs. Town of Orange, 48 Conn. 401.
Planters Bank vs. Bank, 2 La. Ann. 430.
Comstock vs. Frederickson, 51 Minn. 350
Hurd vs. City of Elizabeth, 41 N. J. Law. 1.
Sobernheimer vs. Wheeler, 45 N. J. Eq. 614.
Runk vs. St. John, 29 Borh. 585.
Barclay vs. Quicksilver Min. Co. 6 Lans. 25.
Pugh vs. Hurtt, 52 How. Pr. 22.
Dyer vs. Power, 60 Hun. 583.

L. C. Black as receiver could undoubtedly have maintained this suit in Kentucky in his own name. (Kentucky Codes, Secs. 21, 302.)

The State of Kentucky allows foreign receivers to sue in that state by comity when there are no domestic creditors requiring protection or no infringement of the public policy of that state or no injustice would be done thereby to the citizens within its jurisdiction.

Rogers vs. Riley et al. (Ky.) 80 Fed. 759, 760.
Zacher vs. Fidelity Trust & Safety Vault Co. (Ky.) 106 Fed. 593, 595.
Kirtley vs. Holmes (Ky.) 107 Fed. 1, 9.
Johnson vs. Roger's Receiver (Ky.) 43 S. W. 234.
Zacher vs. Safety Vault Co. (Ky.) 59 S. W. 493.
Weedon vs Association (Ky.) 59 S. W. 758.

This seems to be the general rule.

Howorth vs. Augle, 162 N. Y. 179.
Howorth vs. Lombard, 175 Mass. 570.
Howorth vs. Elwanger, 86 Fed. 54.
Sands vs. Greeley & Co., 88 Fed. 130.
Burr vs Smith, 113 Fed. 858.
Lewis vs. American Naval Stores Co. 119 Fed. 396, 397.
Metzner vs. Bauer, 98 Ind. 425.
Boulware vs. Davis, 90 Ala. 207.
Cooke vs. Town of Orange, 48 Conn. 401.
Planters Bank vs. Bank, 2 La. Ann. 430.
Comstock vs. Frederickson, 51 Minn. 350
Hurd vs. City of Elizabeth, 41 N. J. Law. 1.
Sobernheimer vs. Wheeler, 45 N. J. Eq. 614.
Runk vs. St. John, 29 Borh. 585.
Barclay vs. Quicksilver Min. Co. 6 Lans. 25.
Pugh vs. Hurtt, 52 How. Pr. 22.
Dyer vs. Power, 60 Hun. 583.

Merchants Natl. Bank vs. McLeod, 38 O. St. 174.
Porter vs. Stoughton Mill Co. 91 Wis. 174.
Wyman vs. Kimberly Clark Co. 93 Wis. 554.

There is nothing in the public policy or decisions of Vermont which preclude a foreign receiver from suing in the courts of that state, under the circumstances of this case. No creditor in Vermont has intervened to prevent the prosecution of this suit. In fact it nowhere appears that there are any Vermont creditors of The Great Western Mining & Manufacturing Company.

No claims by any Vermont creditors were presented to the Master appointed by the United States Circuit Court for the District of Kentucky. (Report of Master, Exhibit 111, Rec. 373-377.)

B. D. Harris' Estate alone is objecting to this suit being maintained.

THIRD POINT.

The right to recover on the one hand property of a corporation or its proceeds which have been misappropriated by officers and directors, or on the other hand damages for its misappropriation is in the corporation.

I.

This proposition has been settled by this court.

In Porter vs. Sabin, 149 U. S. 473, it is said, p. 478: "The right to maintain a suit against the officers of the corporation for fraudulent misappropriation of its property is a right of the corporation; and it is only when the corporation will not bring the suit, that it can be brought by one or more stockholders in behalf of all. Hawes vs. Oakland, 104 U. S. 450. The suit, when brought by stockholders, is still a suit to enforce a right of the corporation, and to recover a sum of money due to the corporation; and the corporation is a necessary party, in order that it may be bound

by the judgment. Davenport vs. Dows, 18 Wall. 626. If the corporation becomes insolvent, and a receiver of all its estate and effects is appointed by a court of competent jurisdiction, the right to enforce this, and all other rights of property of the corporation vests in the receiver, and he is the proper party to bring suit, and, if he does not himself sue, should properly be made a defendant to any suit by stockholders in right of the corporation."

In Van Weel vs. Winston, 115, U. S. 228, a bondholder attempted as creditor of the company to charge the president thereof with fraudulent misappropriation of the proceeds of the sale of the bonds. This court held that the bill was properly dismissed, because the wrong done, if wrong there was, was done to the company and not to the bondholders, and the right to redress was in the company or its stock holders.

II.

This is not a suit against B. D. Harris as a stockholder to recover $22,500.00 or $45,000 par value of stock which was issued to him as fully paid up, when he paid no consideration therefor. Such a cause of action, apart from the stock having been secretly distributed just before other stockholders and bondholders were about to be taken in, as the existing stockholders at the time of actual distribution, except Holden, assented, may be in the creditors.

Handley vs. Stutz, 139 U. S. 417, 426-428.

Camden vs. Stuart, 144 U. S. 104, 113-115.

It is not a suit brought on behalf of the bondholders and stockholders for fraudulent misrepresentation as to the value of the bonds or shares taken by them. Such right of action, as said by the United States Circuit Court of Appeals, would only lie in favor of the creditors to whom the misrepresentations were made.

It is not a suit against stockholders *as such* to annul the

alleged contract made by them with themselves as directors under date of May 3, 1889, and to recover the consideration paid thereunder, by which contract they in form pretended to sell stock to the purchasers from the company of bonds with a bonus of stock, but in reality turned it back to the corporation to issue to the purchasers of bonds as bonus stock. If it were, it may be that the stock would have to be tendered back by the corporation.

It is a suit against a director and the president of the company as such officer, having in charge its funds, to charge him with $75,000.00, part of the proceeds of a loan to and assets of the corporation, or what is the same thing dam ages in that amount for taking the $75,000.00, which came into his hands and under his control as an officer and director of the company, which he, as charged in the bill, conspired with his co-directors to fraudulently appropriate to the extent of $22,500.00 to his own use and to the extent of $52,500.00 to the use of his co-officers and co-directors; and in order to consummate s[illegible] fraud, adopted the plan, as charged in the bill, of s[illegible] issuing to himself and his co-directors $150,000.00 of stock without consideration, and of secretly turning it back to the corporation at fifty cents on the dollar, under the pretense of enabling it to carry out its contract to sell $300,000.00 of bonds at eighty-five cents on the dollar, with $150,000.00 of stock as a bonus, when, at the time, the corporation had $2,750,000 of the same stock in its treasury.

If the contract of May 3, 1889, between the stockholders and the directors be treated as anything more than a mere form, to help accomplish the abstraction of $75,000.00 it is maintainable as a suit to recover damages from a director for fraud in the sale of his and his co-directors' worthless stock to the corporation, which had $2,750,000 of the same worthless stock still in its treasury, to the damage of the corporation as representing all actually or potentially interested in it.

III.

The case is persistently attempted to be treated by the respondents as simply one by a corporation against stockholders because of a gratuitous distribution of stock among themselves. Demonstrating that such an action is not maintainable when all the stockholders assent, and thus getting the stock into the hands of Harris except as against subsequent creditors, they further attempt in order to meet the other phases of the case to treat the case as one where one person owns stock and another bonds, and they get together and appoint Carlisle agent to sell the two together for the lump sum of 85 cents on the dollar to purchasers, agreeing between themselves to divide the 85 cents in the proportion of 25 cents for stock and 60 cents for bonds.

They then say the purchasers of the bonds and stock can not object to this for it is none of their business if they got the bonds and paid-up stock, how the proceeds were divided nor the corporation because it was a party to it.

Even this theory of the contract of May 3, 1889, does not avail the respondents as the assumed owners of this stock were also the sole directors of the company which owned the bonds, and the court would look upon such an arrangement with much suspicion on its face and require the strongest evidence of good faith in order to sustain such a contract as against the corporation.

But the difficulty with this theory is that it is at variance with and ignores the most material facts.

The issues of stock and the contract of May 3, 1889, were in the first place dishonest, unfair and inequitable, and not in the interest of the company, but of the directors alone. The company did not have to pay out $75,000 for stock. It had $2,750,000 on hand. If these gentlemen had not been directors, who pretends to say such a contract would ever have been made by any honest directorate?

No one in the next place ever dealt with Carlisle as the joint agent of the owners of stock in The Great Western Mining & Manufacturing Company, and of the company as the owner of its bonds, or as the agent of unknown principal or principals. He acted as the secretary and treasurer of the company and its avowed agent alone. Elliott, Johnson & Co. had a contract with the company through him, April, 1889, giving them the privilege to buy $300,000 of bonds at 85 cents, for $255,000, to be accompanied with a gift of $150,000 of bonus stock.

This is the only contract. No one else came in contact with Carlisle or Harris, or other officer. The company had in its treasury $2,750,000 of stock, at the time this contract was made, and $250,000 of the stock was nominally owned by the stockholders. These stockholders were also the directors who had authorized the contract to sell the $300,000 of bonds for $255,000, and to give $150,000 of bonus stock.

The stock was worthless at the time. Carlisle attempts to say that Harris did not want to give up his stock. But Carlisle, except when corroborated by written documents, is not trustworthy. His letters of August, 1888, show what he and Harris wanted. Both courts below are in error when they say the bonds would not sell at 60 cents, but the bonds and stock together would sell at 85 cents. (Rec. 391.) There is no such evidence in the case. No attempt was ever made to sell bonds without stock at 60 cents. Even were it true the company had plenty of stock without paying $75,000 cash, for some more. If the Circuit Court of Appeals had realized the fact in place of thinking the contrary to have been the fact, it could not have so decided the case as it did.

Having made the contract to sell bonds at 85 cents, the directors authorized the issue of bonds at 85 cents, with a bonus of stock as agreed, but instead of issuing the treasury stock to the purchasers of the bonds, they, after the contract is

made, issue it to themselves secretly, then make a secret contract on May 3, 1889, with themselves as stockholders in form purporting to be a contract to sell stock to the purchasers of bonds, in reality being a contract to sell to the corporation the $150,000 of stock to supply that amount of stock as bonus stock to the purchasers of $300,000 of bonds for $255,000. But the directors were not agents of the purchasers of bonds to buy stock from themselves at 25 cents, and bonds from the company at 60 cents, or both for 85 cents, through Carlisle as a joint agent or otherwise. They had no such authority. They do not pretend to have had.

Besides the purchasers were to get "bonus" stock, i. e. stock which cost them nothing. But on respondents' theory they paid stockholders $75,000 for it. On the true theory they had their stock reduced in value by their proportionate interest in the $75,000 belonging to the company, which was secretly taken by the directors. It is necessarily one thing or the other. The purchasers were to get "bonus" stock and pay 85 cents for bonds. They did not get such stock.

The purchasers were buying bonds from the company at 85 cents and getting stock for nothing *from the company.* The directors, knowing this $255,000 proceeds of the $300,000 bonds was the money of the company under the terms of sale of the bonds, secretly issued stock to themselves and then turned it back to the company to issue as bonus stock. For this they contracted with themselves to pay $75,000, and thus made a secret profit as directors, and used that amount of funds of the corporation which were the proceeds of the sale of bonds.

It is said no one was deceived. The burden of proof was on the directors to show full disclosure to all about to be brought into the company. They could take the funds of the company in no other way. Not only did they fail to show full disclosure but the undisputed evidence is that no one

was informed of this transaction (Rec. 111, 24, 29-36, Ex. 108, Rec. 365).

Elliott, Johnson & Co. were not—and they had the contract giving them the right to purchase all these bonds for $255,000, and to be given $150,000 of stock. They became the owners of a large amount of this stock, so did Henry P. Scott, who negotiated the contract with Carlisle. (Ex. 15, Rec. 221-230.) He testifies they never knew of it (Rec. 24-25), and Carlisle admits that he and his co-directors kept it a secret and never told anybody (Rec. 111). The bill so alleges and it is not denied in the answer (Rec. 7). Whether Elliott, Johnson & Co. be treated as purchasers of the bonds and stock or as agents of the company, as they knew nothing, they could tell nothing. So no one could have known it, except these directors, who remained directors until the company failed. The bill charges that the issue of the stock by the directors to themselves was part of a scheme adopted for the purpose of abstracting from the assets of the company money accruing from the sale of the bonds, and solely for that purpose, that the scheme was carried out by the pretended contract of May 3d, 1889, and that it was never discovered until the month of March, 1894 (Rec. 4, 7).

So the court below is mistaken when it says that the bill fails to charge that any one was deceived, or that there is no evidence to that effect. (Rec. 397.) The bill so charges, and all the evidence on the subject is to that effect.

The transaction must be taken as an entirety. When so taken the net of legal technicality which is weaved about it disappears. The matter resolves itself into the simple proposition that directors of a company not being the only parties interested in the company, secretly took $75,000 of its funds for their own use. Their original investment had been $70,000. As a result of the transaction although the company was hopelessly insolvent, they paid themselves out of its

funds $75,000, and "got back what their stock cost them," and still had their original stock left. If they had been the only parties in interest, the corporation might not have complained. But they were not. They misappropriated the funds paid in by the very people who became very much interested, and whom at the time they intended should become interested.

IV.

Yet the Circuit Court of Appeals for the Second Circuit thus speaks of the case:

"But even if it be assumed that this receiver, by thus bringing suit in the name of this corporation by himself as receiver, can maintain an action on its behalf which he could not maintain as receiver only, it is not clear how this assumption would help the plaintiff corporation. It is, in any event, bound by the rules of law regulating the relations of a corporation to its officers, and, between it and its stockholders and directors, by its contract and the acts done in pursuance thereof.

"A creditor, on the other hand, may by appropriate legal proceedings avail himself of every existing legal right against the corporate officers or stockholders. A contract between a corporation and its stockholders, that they should not be called on to pay therefor in full, is good between the corporation and its stockholders. The creditor defrauded by such a transaction may have such contract set aside. . . . So, too, a receiver, if duly authorized to institute such a suit is a representative of all parties interested therein. He is appointed in behalf of all parties who may establish rights in the cause. (Booth vs. Clark, supra.)

"He may, as a representative of creditors, disaffirm acts of the corporation, and sue to set aside transactions entered into in fraud of their rights. . . .

"The complainant is bound by the allegations of the bill and the contention on which it is based, that this is a suit only in the right of the corporation independent of its creditors, and to which neither the receiver nor the creditors are parties.

We are of the opinion that such a suit can not be maintained by this corporation. . . .

"It would seem that inasmuch as it was agreed as part of the contract between the corporation and its stockholders that the stock should be deemed fully paid the stockholder could not be held liable in a suit by the corporation wherein it seeks to annul its contract as a fraud upon the general creditors of the corporation. . . . We have then, in this case, a suit brought in the name of a corporation, wherein it seeks to repudiate, on the ground of fraud, certain contracts made by it with its officers and stockholders, which, so far as the record shows, was lawful in its inception. Whether it could in any case thus disaffirm its contract and seek to recover the fruits thereof without restoring the parties to their original status, it is not material to inquire. (Scovill vs. Thayer, supra.)

"It is clear that it is not the proper party to maintain this suit.

"The corporation was a party to the contract whereby it was agreed that no payment should be required upon said issues of stock. The evidence shows that the bonds could not be floated without a stock bonus, and, there being no stock in the treasury of the company" (*sic*) "the stockholders contracted with said company to sell to the bondholders directly their own stock, pro rata, in order to provide such bonus. . . .

"In stating these conclusions we do not wish to be understood as holding that the transactions complained of may not have been grossly fraudulent, to the prejudice of certain creditors of the corporation; nor do we question the doctrine that the assets of an insolvent corporation are impressed with a trust for the payment of its debts and can not be withdrawn by the stockholders without providing for such debts, as held by the court below. Assuming the facts found by the court below, we think the receiver has misconceived his right and acted beyond the scope of his authority in thus bringing this suit in the name of the corporation." (Rec. 396-399.)

In support of these propositions the Circuit Court of Appeals cites the cases of:

Scovill vs. Thayer, 105 U. S., 143.

Clark vs. Bever, 139 U. S., 96, 111.

Evans vs. Nellis, 187 U. S., 271.
Handley vs. Stutz, 139 U. S., 417.
Coit vs. Gold Amal. Co., 119 U. S., 343.
Hale vs. Allison, 188 U. S., 56.

These cases have no application to the taking of the $75,000.

Scovill vs. Thayer, 105 U. S., 143, decides that there is no obligation on the part of stockholders as between themselves and the company, where an agreement has been made by the company that no further assessments should be made, to pay for the residue of their stock unless it became necessary to satisfy creditors, and that, therefore, the statute of limitations did not run until the necessity for the payment had been ascertained and an authorized demand of payment made.

Clark vs. Bever, 139 U. S., 96, decides that a corporation in good faith may pay its indebtedness, or sell or dispose of its stock in payment of debts to its creditors at less than par.

Evans vs. Nellis, 187 U. S., 271, decides that under the statutes of Kansas as interpreted by the Supreme Court of that state, only the receiver can bring an action to collect the statutory liability of stockholders for the benefit of all creditors against the corporation and all the resident stockholders, and, therefore, such receiver could not maintain an action in a Circuit Court of the United States against an individual stockholder for the amount of the statutory liability.

Handley vs. Stutz, 139 U. S., 417, decides that a stockholder who receives a gratuitous distribution of stock as fully paid, incurs an obligation to pay for it in full, when called upon to do so by creditors whose debts are subsequent to the increase; but that this equity does not exist in favor of a creditor whose debt was contracted prior to such authorization; and further that a corporation in good faith may give stock as a bonus with and in order to sell its bonds.

Coit vs. Gold Amal. Co., 119 U. S., 343, decides that where

shareholders honestly and in good faith pay for their subscription in property in place of money, third persons can not complain; but where there is a gross and obvious overvaluation of property conveyed in consideration of an issue of stock, there is strong evidence of fraud in an action against a stockholder by a creditor to enforce personal liability for his debt.

Hale vs. Allison, 188 U. S., 56, decides that a receiver can not collect the double liability in a foreign jurisdiction under the laws of Minnesota; and also that the liability was one in favor of creditors, with which the corporation had nothing to do; and that the statute did not make the liability assets of the corporation, or confer upon any receiver appointed in a case the right to enforce it, especially without the jurisdiction of the court.

It is submitted that these cases have no real bearing on the case made by the bill and proof. This suit, as to the $75,000 taken, was not one against stockholders to recover unpaid subscriptions to stock or the value of stock which the stockholders in The Great Western Mining & Manufacturing Co. issued to themselves; but was a suit to charge B. D. Harris because he, with others, was a director and officer of the Great Western Mining & Manufacturing Co.; because as such director and officer he stood in a fiduciary relation to the corporation and all interested in it; and by reason thereof could not take a remuneration for stock, which as a director he had agreed to issue as bonus stock to effect a sale of bonds by secretly issuing the stock to himself and turning it back to the corporation at fifty cents on the dollar to supply to purchasers of bonds.

In other words, the company having agreed to sell bonds at eighty-five cents on the dollar with a bonus of stock, the directors and officers of this company could not, pending such negotiations and after the same were closed by contract,

secretly issue to themselves as stockholders the stock so agreed by the corporation to be given as a bonus and then secretly as stockholders go through the form of selling it to themselves as directors, to enable the company to supply bonus stock to the purchasers of the bonds, and thereby take $75,000 of the proceeds of the sale of the bonds from the treasury of the company. The company needed to buy no stock as it had $2,750,000 treasury stock on hand.

They could not under the circumstances even have sold the stock which they legitimately owned in this way, much less that which they took in order to use in this illegitimate way.

Such a transaction was a fraud on the corporation. It was taking the money of the corporation. The money when paid in by the bondholders for their bonds and bonus stock became the money of the corporation and general assets to be used for all purposes of the corporation (Van Weel vs. Winston, 115 U. S., 228, 245). It did not continue to be the money of the bondholders who paid it. They, it is true, were defrauded both as bondholders and stockholders, because the assets of the corporation were depleted and so has every other creditor and stockholder of the corporation been defrauded for the same reason. But the $75,000 taken, if recovered, does not belong to any special class of creditors, but would be general assets of the corporation.

The directors and officers, at the time they made the contract with Elliott, Johnson & Co., to float the bonds at eighty-five cents on the dollar, with a bonus of fifty cents of stock for each dollar of bonds, stood in a fiduciary relation, not only to themselves as the sole stockholders and to the existing creditors of the company, but also to all the subsequent stockholders whom they contemplated bringing in, the purchasers of the bonds, and the future creditors of the company. They were much more than promoters, in reference to whom the

rule as to good faith, secret profits and full disclosure is so strict. They were directors and officers of an existing corporation and promoters of a new loan and issue of bonus stock.

Contrary to what the Circuit Court of Appeals said the company had an authorized capital stock of $3,000,000. It had only issued prior to the inception of the attempt to sell bonds $200,000. It has $2,750,000 of treasury stock on hand when the contract to float this loan was entered into. It had a perfect right, if it were necessary, to enable it to float its bonds, to increase its capital stock to any amount up to $3,000,000, and to issue the stock as fully paid as a bonus to enable it to float its bonds at eighty-five cents on the dollar.

Handley vs. Stutz, 139 U. S., 417, 420, 435.

Dickerman vs. Trust Co., 176 U. S., 202.

This it agreed with Elliott, Johnson & Co. to do by increasing the stock to $350,000 or $400,000. But instead of doing so, these directors and officers "secretly and, therefore, dishonestly," as said in Re Olympia, Ltd., L. R. (1898), 20 Chan. 153, issued to themselves $100,000 of the stock, and then turned it with $50,000 of stock they had issued to themselves in 1888 back to the company at fifty cents on the dollar and under this guise secretly took $75,000 from the treasury of the company.

FOURTH POINT.

The authorities which are in point are conclusive as to the right of the corporation to claim redress for this transaction.

I.

The cases relied upon by the petitioner are not mentioned in the opinion of the United States Circuit Court of Appeals. It may be we are wholly mistaken in their application, but we

submit that they are precisely in point and analogous to the case at bar. They hold, not only that such a proceeding as the one complained of in this suit is a fraud, *but also that the right of action is in the corporation* as representing all interested in the company whether then actually in or intended to be brought in as creditors or stockholders.

In Richardson vs. Green, 133 U. S. 30, this court said, page 43: "Undoubtedly his relation as a director and officer, or as a stockholder of the company, does not preclude him from entering into contracts with it, making loans to it and taking its bonds as collateral security; but courts of equity regard such personal transactions of a party in either of these positions not, perhaps, with distrust, but with a large measure of watchful care; and unless satisfied by the proof that the transaction was entered into in good faith, with a view to the benefit of the company as well as of its creditors, and not solely with a view to his own benefit, they refuse to lend their aid to its enforcement."

And, again, page 44: "Can the transaction between Richardson and the insolvent corporation of which he was largely the owner and controller, especially with respect to the claim he is urging in this case, stand the test of the fairness and good faith which, as a director and stockholder, he owed to the corporation, its creditors and *bona fide* bondholders?"

In Twin-Lick Oil Co. vs. Marburg, 91 U. S. 587, 588-590, Mr. Justice Miller, delivering the opinion of the court, said, among other things:

Page 588: "That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his case, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others. Koebler vs. Black River Falls Iron Co. 2 Black, 715; Drury vs. Cross, 7 Wall.

299; Luxemburg R. R. Co. vs. Maquay, 25 Beav. 586; The Cumberland Co. vs. Sherman, 30 Barb. 553; 16 Md. 456."

And again, p. 590: "If he should be a sole director, or one of a smaller number vested with certain powers, this obligation would be still stronger, and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness."

See also Thomas Trustee vs. Brunswick, Fort Kearney & Pacific R. R. Co. et. al, 109 U. S. 522, 524.

Wardell vs. The Union Pacific Railroad Co. 103 U. S. 651.

McGourkey vs. Toledo & Ohio Railway, 146 U. S. 536, 552.

Clark vs. Bever, 139 U. S. 90, 113.

Redmond vs. Dickerson, 9 N. J. Eq. 507, 513.

Hortings vs. Drer, 76 N. Y. 9, 16.

Sawyer vs. Hoag, 17 Wall. 610.

Rothchild vs. Memphis & C. R. Co. 113 Fed. 476, 481.

Wyman vs. Bowman, 127 Fed. 257, 274.

Sutton Mfg. Co. vs. Hutchinson, 64 Fed. 496, 501.

Robison vs. McCracken, 52 Fed. 726, 730.

Jessup vs. Illinois Cent. R. Co. 43 Fed. 483, 503.

(1) London Trust Co., Ltd., vs. Mackenzie, 68 Law Times Rep. 380, illustrates this case.

The directors of a company entered into an agreement with a firm of contractors to do certain work for the company for a specified sum in debentures and fully paid shares of the company, and also made, secretly, certain contemporaneous agreements with the contractors to make over to third parties, without consideration, a certain portion of these debentures and shares. Each of the shareholders and debentureholders who were in the company when this agreement was made took a benefit under one or other of the contemporaneous agree-

ments and all agreed to such disposition of the debentures and shares. The court said:

(Page 384): "The plaintiffs in substance claim a declaration that the defendants are liable to make good to the company the amounts of these appropriations as being in effect a giving away of capital of the company and beyond the powers of the directors.

"The more substantial defenses are two. First, it is said that the arrangement was one to which every one who had an interest either as a shareholder or debentureholder or creditor agreed, that no one was wronged or defrauded and that under the circumstances the case of Re The Gold Mining Co., 11 Ch. Div. 701; Re The Ambrose Lake Tin & Copper Co., 14 Ch. Div. 390, and Re The British Seamless Paper Box Co., 17 Ch. Div. 467, apply and neither the company nor the plaintiff's shareholders could complain.

"But those were all cases of persons who owned the entire capital of the company and intended to remain the sole proprietors, and they were held free to make honest agreements among themselves as to the appropriation of their property, whereas in the present case there was to be a large issue of shares to the contractors which it must have been intended that the public should take up, and there remained a large part of the share capital to be alloted in the future, and the parties to the present agreements were taking for themselves thirty thousand pounds of the company to the detriment of all who might take any such shares and they were doing so secretly and were misrepresenting by the prospectus and registered deed the real nature of the transaction.

"It seems to me the company is entitled to protect the future shareholders and its own funds against such appropriation and that the very cases relied on by the defendants are authorities for this view. 'If,' said James, L. J., in the last cited case, 'they were intending although then constituting the whole company that other people should come in afterwards to whom what had been done would be injurious the court would feel no difficulty in saying as Lord Langdale did in The Society of Practical Knowledge vs. Abbott, 2 Beav., 559, that they intended to commit a fraud.'"

And again,

(Page 385): "Mr. Masterman drew a distinction which does not appear to be tenable. It was *qua* shareholder not *qua* director, he said, that he stipulated for the bonus as a condition of giving his consent. But as director he gave a profit to himself as shareholder and the director must account for it. . . .

"Objections were raised to the right of the plaintiffs to maintain this action. So far as the company is concerned it is for the reasons already given entitled to sue in the interest of those who hold the shares issued to the contractors or to be issued to the public."

(2) Hayward vs. Leeson, 176 Mass., p. 310, covers all the points raised by the defense in this case. In that case directors of a corporation, who, before any capital stock had been issued to the public, caused to be issued to themselves, as a remuneration for their services as promoters and for options on land, by the vote of all persons who then had any interest in the corporation, one third of the whole capital stock and then invited subscriptions to the stock without disclosing that fact, were held: (1) Guilty of a fraud; (2) Liable in a suit in equity (which should in a foreign jurisdiction be brought in the name of the corporation and not in that of the receiver) to account for the net profits received by them; or damages suffered by the company; (3) At the option of the company as it chose to follow the shares or the proceeds thereof or to recover damages; (4) And had no right to demand that the company tender back the lands acquired by it under the options transferred in exchange for the stock.

The court said—in answer to the contentions; that the stock issued was lawfully issued for interest in lands and for services rendered or to be rendered; that there was no fraudulent over-valuation in the issue of the $700,000 shares of stock; that the issue of the stock was voted for by the defendants and others as stockholders, and that stockholders are

under no fiduciary relation to anybody and can do as they will with their own; and moreover that it was consented to by all the stockholders of the East Tennessee Land Company, and, consequently, could not then be made the basis of any complaint by the corporation or anybody else:

(Page 318): "Moreover, it is not sought in these suits, to charge the defendants because they voted as stockholders to issue the $700,000 of stock; but it is sought to charge each defendant because he, with others, was a promoter of the East Tennessee Land Company; because as a promoter he stood in a fiduciary relation to the future shareholders of that corporation, and by reason thereof he could not receive any remuneration for his services as a promoter of that corporation without making a full disclosure thereof, and obtaining the consent of those shareholders thereto." (Citing cases) . . .

(Page 320): " . . . The person to whom the promoters owe the duty which they owe by reason of their fiduciary relation are the persons who put their money into the enterprise at the invitation of the promoters, that is to say, the future stockholders. It is to the future stockholders that the promoters must make the disclosure of the remuneration which is, or is to be, paid to them, and it is the consent of the future stockholders that must be obtained to make that payment valid; if the promoters undertake to make to themselves remuneration for their services as promoters without making a full disclosure of the fact to the future stockholders, their principals, and getting their consent, they are guilty of a fraud."

(Page 326): "Upon substituting the East Tennessee Land Company as plaintiff in place of John K. Hayward, the causes are to stand for hearing as to what the net profits are, which the defendants have respectively received, or as to what the damages are, which the plaintiff has suffered, as the plaintiff shall elect to proceed for the property or its proceeds on the one hand, or for damages on the other hand."

(3) The case of Re The British Seamless Paper Box Co., 17 Ch. Div. 467, was one in which all the owners of shares in the company had allotted to themselves a large amount of

stock without consideration. The company afterwards failed and the attempt was made to hold the stockholders for the shares so allotted.

In addition to what James, Lord Justice, said on page 476, quoted in London Trust Co., Ltd., vs. Mackenzie, ante, Brett, Lord Justice said:

(Page 478): "I agree that if shortly after such a transaction directors admitted new shareholders, it would be strong evidence that they intended at the time to take in new members, and unless all the circumstances are disclosed to them the directors might be made liable for misfeasance because it would be inferred that they intended to act for the future members as well as the present."

And again, Cotton, Lord Justice, said:

(Page 479): "We have not heard counsel on behalf of the respondent but subject to what they may aver I should have said that if this had been an ordinary company in which there was an intention to admit new members and offer the shares to the public, the official liquidator would have been entitled to call on the directors to account for the value of their shares. But on what principle? It is that the directors stand in a fiduciary relation to the whole company, that is, not only to the existing members but to all whom they intend to bring in. A trustee can not make a profit for himself without the full knowledge of all his cestuis que trust, and so the directors of a company formed in the ordinary way stand in a fiduciary relation not only to those who are members at the time, but to all who may come in after." . . .

With reasoning such as this, the court would have had very little difficulty in holding directors liable, for issuing $150,000 of stock to themselves and using it to take $75,000 from the company, under an agreement made with themselves, after they had agreed to sell bonds and issue bonus stock, especially if they never really took the money until long after the bonds and stock had been issued and sold, and the new members were in, and the money was taken from the

proceeds of the very loan which had brought in the new members.

(4) Another English case is that of In Re Anglo French Cooperative Society, L. R. 21 Ch. Div. 492.

In that case the directors paid to a promoter £3,000 for expenses and for the discovery of a plan to float its debentures. The expenses were £400 and there was an understanding between the directors and promoters that the remaining £2,600 should be invested by the promoter in the debentures of the company to be floated. The £3,000 was paid to the promoters who retained £400 for expenses and bought of the company £2,600 of the debentures. The debentures so purchased were then divided according to arrangement between himself and the directors being all the persons interested at the time of the agreement in the company.

It was held that this was a clear misapplication of the £2,600 the funds of the company; that the company could recover the full £2,600 from the directors; that they were jointly and severally liable therefor; that the investment of the money in debentures of the company was not a repayment thereof to the company. Vice Chancellor Hall, who delivered the opinion of the court, said:

(Page 496): "No person who has any management or control of the affairs of a company, or who occupies any fiduciary position in reference to a company can merely because such an agreement has been signed say that such a sum could be allowed as against the company or taken out of its assets.

"The amount itself shows that it was not a proper payment. As has been observed this was a company that was going on. It is not like the case of the British Seamless Paper Box Co., 17 Ch. Div. 467, which has been referred to by Mr. Grosvenor Woods. It is not a case of that kind. The parties were in the position of owing a duty not merely to the persons who were then interested in the company, but to all persons who should afterwards be in the company. It seems to me that this was a clear misapplication of the money of the company."

The decision was affirmed on appeal.

(5) Another case is that of Gluckstein vs. Barnes, L. R. (1900) App. Cas. 240, decided by the House of Lords on appeal from the Court of Appeals where it was reported as Re Olympia Co., Ltd., L. R. (198), 2 Ch. 153.

In that case a secret profit was made by directors and promoters of a company.

In the course of his judgment, Lord Chancellor Halsbury said:

(Page 247): "They were to be sellers to themselves as buyers, and it was a necessary provision to the plan that they were to be both sellers and buyers, and as buyers to get the money to pay for the purchase from the pockets of the deluded shareholders.

"My lords, I decline to discuss the question of disclosure to the company. It is too absurd to suggest that a disclosure to the parties to this transaction is a disclosure to the company of which these directors were the proper guardians and trustees."

Lord Macnaghton said:

(Page 248): "And then comes the last act. Secretly, and therefore dishonestly, they put into their own pockets the difference between the real and pretended price.

"After a brief career the company is ordered to be wound up. In the course of liquidation the trick is discovered. . . .

"Disclosure is not the most appropriate word to use when a person, who plays many parts, announces to himself in one character what he has done and is doing in another. To talk of disclosure to the thing called the company, when as yet there were no shareholders is a mere farce. To the intended shareholders there was no disclosure at all. On them was practiced an elaborate system of deception."

Lord Robertson said:

(Page 257): "The directors of the company are its executive organ; to them its interests are confided and in the present instance the company, even in this its inchoate stage, was identifiable through its executive.

"I hold that from the moment this step was taken the com-

ing directors stood in a fiduciary relation to the company, whose interests were to be in their sole hands. This conclusion rests not on technical rules of law, but on the dictates of fair play embodied in law. The people for whom these gentlemen were bound to act were their coming constituents, the persons out of whose money they proposed to make their gain."

(6) The case as reported below Re Olympia, Ltd., L. R. (1898), 2 Ch. 153, also contains some significant expressions.

Lord Lindley, in the course of his judgment, said:

(Page 167): "What effect then has such a knowledge of such persons on the right of the company to claim the profit thus being made by its directors and promoters out of it? My answer is, none whatever, except to deprive the directors who share in the profits of all possible defense to such claims To say that the knowledge of such persons of their own conduct, which from first to last they were doing all they could to conceal, is to be treated as the knowledge of the company or of the shareholders, is to say that which is opposed not only to common sense, but also to well settled principles of law."

Rigby, L. J., said:

(Page 173): "There never was the slightest intention on the part of any one of the directors to do his duty to the company with reference to the transaction impeached; they were only trying secretly as regards the main bodies of the subscribers for shares to weave a net of legal technicality which might hamper the company in its endeavors to get rid of the fraud attempted to be practiced."

Cotton, L. J., said:

(Page 175): "The corporate entity towards which the duty exists is a thing apart from the seven individuals who for the time being are the only corporators, and the question whether disclosure to them will suffice or not, will depend on whether the constitution of the company is really such that they can be in fact contemplated as exhausting all the persons whom the company is intended to embrace. There may be a company such as is sometimes called a private company or some-

times a one man company where by its very constitution no one is intended to have, and can not be contemplated as being about to acquire, an interest in the company except the signatories themselves. In such cases the fiduciary obligation might not extend beyond such persons: See Salomon's Case, L. R. (1897), App. Cases, p. 22.

"But where, as here, the very pith and marrow of the whole venture is that cash to the extent of one hundred and eighty thousand pounds shall be subscribed by the public for the benefit of the promoters and directors, the duty extends to all the persons who are to be contemplated as about to become purchasers. There is abundant authority for these propositions."

In this connection Cotton, L. J., cited:

Erlanger Case, L. R., 5 Ch. Div. 73, 113, 123.

In Re British Seamless Paper Box Co., 17 Ch. Div. 471, 477-8.

All these cases only apply the principles laid down as far back as Hitchens vs. Congreve (1828), 4 Russ. 562. There are many other English cases to the same effect.

Phosphate Sewage Co. vs. Hartmond, L. R., 5 Ch. Div. 394.

Broderlip vs. Salamon, L. R. (1895), 2 Ch. 323, 329.

Broderlip vs. Salamon, L. R. (1897), App. Cas. 22.

In Re Postage Stamp A. D. Co., L. R. (1892), 3 Ch. 566, 576.

American cases are also not lacking:

Dickerman vs. Northern Trust Co., 176 U. S., 181, 203, 205.

Hoffman Steel & Coal Co. vs. Cumberland C. & I. Co., 16 Md., 456.

Cumberland Coal & I. Co. vs. Sherman, 30 Barb., 553.

It is true some of these cases are promoter cases. Is there any difference between the duties of a promoter and a director except in degree as to full disclosure to those entitled to

know, honest and fair dealing, and secret profits in violation of their trust? Which owes the higher duty to the company? Were not these directors promoters of this loan for the company? Could they secretly issue and sell it stock at a profit to themselves without disclosure? Were they not, as Rigby, J., says, by the agreement of May 3, 1889, never disclosed, "trying to weave a net of legal technicality, which might hamper the company in its endeavor to get rid of this fraud?"

Does it take any imagination to reach the conclusion that, had Elliott, Johnson & Co., and the purchasers of the bonds and bonus stock known, as the undisputed evidence is they did not know, that the directors of the company, who had agreed to sell them bonds at eighty-five cents on the dollar with a stock bonus, intended to take $75,000 or almost one third of the proceeds of the sale to their individual use, they would never have consented to the arrangement? Were not these directors and officers bound to deal fairly and honestly with those they intended to take into the corporation? Did and does not the corporation represent all interested? Was it not the funds of the corporation which were taken?

Could they sell them bonds at eighty-five cents on the dollar with bonus stock, and then secretly reduce the assets of the corporation $75,000 by a private agreement between themselves as stockholders and directors to issue the stock to themselves, to sell "bonus stock"—their stock—to the purchasers of bonds without the latter's knowledge! Were not Elliott, Johnson & Co., and the purchasers from them, entitled to be informed that the stockholders had agreed with the directors to sell stock to them at fifty cents on the dollar and bonds of the company at sixty cents? Did it take any acquaintance with legal principles to apprise the Carlisles and Harrises that they were dealing unfairly with these purchasers, and that they were dealing with

the funds of the corporation as if they were the only parties in interest and in their own interest alone? Was not their failure to disclose the agreement of May 3d, 1889, dishonest? Was not their "secret taking," and therefore in the language of Re Olympia, Ltd., "dishonest taking" of the $75,000 after these stockholders and bondholders had come into the company, a misapplication of its assets? For it is not what the directors said, but what they failed to disclose, which is the gravamen of the complaint.

Indeed it is difficult to see on what theory the transaction can be seriously supported. The burden of proof was upon the defense to show entire good faith in the transaction and the fullest disclosure of all the facts to all who were actually or potentially interested. Instead of that the complainant established by the mouth of an adverse witness and one of the chief participants in the fraud the facts which show a deliberate, long-planned and successfully executed fraud upon those to whom he and his co-directors occupied a fiduciary relation, at a loss to the company of $75,000 of its assets.

II.

The force of some of these authorities is attempted to be overcome by the argument, that they only apply to "prospective original subscribers of stock," and that "future shareholders" means "holders of stock to be issued in the future," and that they have no application to this case, because here the purchasers of the bonds and bonus stock "buys stocks from an existing stockholder" and were not "putting money into the enterprise." Here again the learned counsel hark back to the form of the agreement of May 3d, 1889, and try to plant themselves on the proposition that Elliott, Johnson & Co., and the purchasers from the company of bonds with bonus stock were buying stock from Harris & Carlisle. Again we repeat they bought bonds from the company at 85 cents,

and were to be given *by the company* stock for nothing. That was the contract. The directors by dealing with themselves couldn't make it, another contract to sell their stock to the purchasers of bonds.

The principle behind the cases relied upon by petitioner is that directors can not take an unfair advantage whether promoters and directors of an original company, or directors of a going concern, without perfect good faith and full disclosure to all actually interested or intended at the time to interest in the company, whether as stockholders or bondholders or creditors; that these directors, by a dishonest contract with themselves, did make a sereret profit; that they did not disclose it to these bondholders and stockholders, who they not only then intended to bring in, but had actually contracted to bring in on the basis of their paying $255,000 for bonds, and to be given $150,000 of stock by the company, which should cost them nothing; that these bondholders put—"their money into the enterprise," and because interested as creditors and also as stockholders in ignorance of the stock issues and the contract of May 3, 1889, which it was the duty of the directors to disclose to them before they took the secret profit; that the burden of proof was on the directors to show such disclosure; that not only they failed to show such disclosure but admitted they never made it; and that the corporation whose funds were so taken as representing all interested in the company can recover its funds so taken, from these directors.

It may be that individual bondholders or stockholders may have a cause of action for actual misrepresentations made to them by Carlisle. That is no concern of the plaintiff in this case. It is a suit to recover corporate funds taken by directors dishonestly and to their own profit alone, without the knowledge and consent of all actually or potentially interested in the corporation at the time they took them.

There is no case cited by the respondents which under such circumstances holds that the corporation has no cause of action. If any such case there be, it must be erroneous on principle, because contrary to every instinct "of fair play embodied in law."

The cases relied upon by respondents are like In re Ambrose Lake, etc., Mining Co. L. R. 14, Ch. D. 390, where the persons complained of were alone interested in the company, and *intended to remain the sole proprietors* and were held to be entitled to make honest agreements under such circumstances among themselves; or else they were cases like Foster vs. Seymour, 23 Fed. 65, or Flager Engraving Machine Co. vs. Flager, 19 Fed. 468, where the question was not under the facts involved or if so was not raised.

Thus in Foster vs. Seymour, directors being the only members of the corporation took the whole capital stock as fully paid, in exchange for property as allowed by statutes, and afterwards as stockholders sold it to innocent purchasers. The latter were held not entitled to maintain a suit to compel the directors to account to the corporation *for a fraudulent disposition of its capital stock.*

It did not appear that they at the time intended to bring in others, nor was such a suggestion made. They took no funds of the corporation. They simply valued some property they conveyed to the corporation as representing so much paid-up stock.

The court said: "There was no fraud upon the corporation. At the time the scrip was exchanged for the mining property, the trustees were all there was of the corporation. There were no stockholders unless they were stockholders. What was done was done by the corporation. By the exchange the corporation got the mining property, and gave it back to those from whom it got it, divided into 100,000 shares of the nominal value of $100 each. The Ambrose Lake Tin and Copper Min. Co. (Ex parte Taylor) L. R. 14 Ch. Div. 390; Re Seamless Box Co. F. & R. 17 Ch. Div. 46."

Is that this case? Did the Great Western Mining and Manufacturing Company get any property for its stock? Did it give shares for property at any valuation? It seems it gave up $75,000 for 1,500 shares of its own stock at a time when it had 27,500 shares in its treasury, and the $75,000 was the proceeds of a bond issue at 85 cents on the dollar.

Flager Engraving Machine Co. vs. Flager, 19 Fed. 468, is equally inapplicable.

In that case certain persons were induced to buy stock issued in exchange for property by false and fraudulent representations, the proceeds of which were given to the company. Having gained control of the company they sought through the company to recoup their individual loss from those who had made the representations to them.

The court said, page 470: "The purchasers, some or all of them, may have a right to set aside the sales, and to recover their money of the company or the defendants, or both, but they are necessary parties to the suit or suits, and they can not by obtaining control of the company, set up an artificial case and recover through the company what is really their own loss, from which the company itself was enriched."

Is that this case? Is this case based on the fact that The Great Western Mining & Manufacturing Company "was enriched" by false and fraudulent representations made by it or on its behalf? It would appear on the contrary that the directors secretly took $75,000 of its funds in exchange for $150,000 of its own stock when it had $2,750,000 of such stock in its treasury.

Had the directors issued the stock to the purchasers of bonds instead of issuing it secretly to themselves in 1888 and 1889, and secretly turning it back to the company for $75,000 of its funds, there could have been no complaint that either the funds or stock of the company were misappropriated. Certainly the company would have had $75,000 more

cash, and its capital stock would have been as it is, $350,000.

The other cases cited are equally beside the question. If any reported case has ever decided that a director of a corporation can take its funds without the knowledge and consent of all interested in the corporation, because he makes a secret contract on behalf of the corporation with himself as an individual, which contract is not an honest one, but solely in his own interest, and not in the interest of the corporation, it has not yet been referred to in this case.

If any case holds that under such circumstances the corporation can not maintain a suit to recover the funds so taken it has not been pointed out.

The cases which are relied upon, show that if funds of the corporation have been taken the corporation is the proper party to bring the suit.

FIFTH POINT.

The Estate of B. D. Harris is Liable for the entire $75,000,00 of the Funds of the Company Misappropriated by the Directors.

Judge Wheeler in his opinion in the United States Circuit Court (Rec. 185, 191) proceeded upon the theory that the estate of B. D. Harris, whatever might have been Mr. Harris' personal liability if he had lived, was only liable for part of the amount finally retained by him. Although he retained $22,500.00 the court held that his estate was liable for only $15,000.00, because there had been issued to him contemporaneously with the sale of the bonds only 300 shares of stock of the 450 turned back to the company at fifty cents on the dollar.

The result of this holding was that, as to the other 150 shares which were turned back to the company by R. D. Harris to give to the bondholders as a bonus and for which he received $7,500.00 there was no liability of his estate to refund that amount.

The court seemed to make the right of recovery of the complainant depend entirely upon the issue of the stock to Harris contemporaneously with turning it back to the company.

Had no stock been issued at all by the directors to themselves at that time or during the negotiations with the intent to use it to refund to themselves the $70,000.00 their *bona fide* stock had cost them, and had the stock actually furnished by the directors been stock *bona fide* purchased by them in 1883, the transaction would have been illegal and fraudulent in view of all the facts and circumstances.

Of course, the issue to themselves of $50,000.00 of stock in January, 1888, during the negotiations for the sale of the bonds, and $100,000.00 in April, 1889, after the contract to sell had been made, without consideration enabled them to turn it back to the company for $75,000.00 without diminishing their original holdings. They had left as many shares of stock representing as much value as if $150,000.00 of treasury stock had been issued by the company and given to the purchasers of bonds without any expense to the company or others interested. But the directors would have had no right to have used their original holdings of stock for the purpose of abstracting $75,000.00 of the proceeds of the bond issue from the treasury of the company. The stock was entirely worthless, and even had it had a value, such a secret transaction would nevertheless have been a fraud upon the company and others interested, such as the prospective bondholders and stockholders whom they were inducing to enter into the company. It would not have been an honest bargain in view of the fact that the company needed to buy no stock to fulfill its contract. The issues of stock were incidents of the illegal transaction and while cogent evidence as to the fraudulent scheme devised to abstract the $75,000.00, do not determine the rights of the complainant. So the Harris estate is certainly liable for the $22,500.00 he retained.

As to the remainder of the $75,000.00 divided among the other directors and stockholders, the Circuit Court was of the opinion that as Harris had not personally retained the $52,500.00, his estate was not liable therefor. The liability, however, of the directors was joint and several. (See cases ante.)

The court, it seems to us, overlooked the important consideration that the entire $75,000.00 was taken by the officers and directors of the company from the treasury of the company as a result of their joint action, that each of them was the trustee of all of it and took the whole of it. The fact that they agreed among themselves to give certain parts of it to certain of their number can not militate against the proposition that in the first instance it was a taking of the entire sum by each for which they were jointly and severally liable. As well might it be claimed by the representatives of a thief who had stolen $100.00 and given one half to his accomplice, that he was only liable to account for the $50.00 his estate had actually finally benefited by the transaction.

The court recognized the proposition contended for (Rec. 191; Great West. Min. & Mfg. Co. vs. Harris, 111 Fed. 38, p. 44) when it said:

"If it had all been received by the directors together and divided among themselves, all would probably have been liable together, and each for the whole till all should be recovered; but each received his share separately without connection with the others from the avails of the sales of the bonds that his stock went with. Each may have been liable for the whole loss for neglect of personal duty in not preventing it, but not for the money itself."

The court overlooked in this statement the fact that the $75,000.00 taken was part of the $255,000.00 received for $300,000.00 of bonds; that it was taken as the result of a concerted plan to get out their investment in the stock of $70,000.00; and that, even the agreement of May 3d, 1889,

both in its terms and in its substance, shows that the directors did act together, provided for the division of the money from the sale of the "bonds at the price of 85 per cent. of the par value thereof" and "divided" it among themselves.

It is also charged on the books as a bond expense in one sum of $75,000.00. It was all received by John Carlisle as secretary and treasurer acting for the company, and divided among the directors according to agreement. They finally retained their shares separately, but in the first instance had the $255,000.00 in their possession and under their control as directors and apportioned $75,000.00 of it according to the agreement.

How can it be said that this was done without connection with each other? If directors were ever connected with each other in taking assets of a corporation, these officers and directors it is submitted were so connected and acted together in this case. Having gotten the $75,000.00 in their official capacity, that they chose afterwards to apportion it between themselves can not alter the fact that they, and their estates in the event of their deaths, were jointly and severally liable for the entire amount.

Conceding for the sake of argument that the action is governed as to survivorship by the law of Vermont, under the statutes and decisions of that state Harris' Estate is liable for all the funds he converted as director, whatever he may have done with them afterwards and although he retained only personally $22,500.00.

Thus, in Witters, Receiver, vs. Foster, Administrator, 26 Fed. 737, in an action against a director of a national bank for negligent performance of his duty in not requiring a bond from the cashier and other mismanagement of the affairs of the bank, Wheeler, J., while holding that the action abated by reason of the death of the defendant said:

"The important question is whether the cause of action

survives. This question is to be determined by the law of the state of Vermont, where the bank was situated, and the intestate died. Henshaw vs. Miller, 17 How. 212. The laws of the United States prescribe methods only for reviving suits that do survive, but do not prescribe what suits shall survive. Rev. St., Section 955. The statutes of Vermont applicable to this case provide that actions of trespass and trespass on the case, for damages done to real or personal estate, shall survive. (Rev. Laws, Section 2133.) This statute is not any more broad than the English statutes of 4 Edw. III. c. 7. Barrett vs. Copeland, 20 Vt. 244; Dana vs. Lull, 21 Vt. 383; Bellows vs. Allen, 22 Vt. 108; Winhall vs. Sawyer, 45 Vt. 466; Redfield, J., Manwell vs. Briggs, 17 Vt. 176.

"The ground of the orator's claim against the intestate was his personal and official guilt, not the misappropriation or misapplication of any property of the bank in his possession, not the interference by him with any property of the bank in possession or in action, but the omission of duties, which it performed, might benefit the assets of the bank. In Hambly vs. Trott, Cowp. 372, Lord Mansfield said: 'All private criminal injuries or wrongs, as well as public crimes, are buried with the offender.' There are many cases under such statutes where it is held that actions resting upon such personal wrong-doing, although followed by pecuniary damage, do not survive."

See also:

Boston & Me. R. R. et al. vs. Graves, 80 Fed. 588, 590.

Gt. West. Min. & Mfg. Co. vs. Harris, 96 Fed. 503, 504.

Gt. West. Min. & Mfg. Co. vs. Harris, 111 Fed. 38, 44.

Bellows vs. Allen, 22 Vt. 108.

In Bellows vs. Allen, 22 Vt. 108, a deputy sheriff collected on execution money and detained it, and was sued for not paying it over. It was held the action survived.

In this case the directors received this $75,000.00 in their

fiduciary capacity as part of the proceeds of the sale of the bonds. They had it under their joint direction and control, and each of them was responsible for its custody. They paid it out to themselves under an agreement with each other, and they all did this at the expense of the corporation.

The mistake of respondents and the court below consist in treating the contract the directors made with themselves of May 3d, 1889, without the knowledge of any one, as being a contract with the purchasers of the bonds, and that, therefore, Elliott, Johnson & Co. and other purchasers through them paid to John Carlisle as agent of the stockholders severally $25.00 a share for their stock. This is again the old fallacy of treating the secret contract of May 3d, 1889, which the directors made with themselves as a contract with the purchasers of bonds. It takes two parties to make a contract and act under it. The corporation through Carlisle as secretary and treasurer was dealing with the purchasers. They never dealt with Carlisle as agent of stockholders nor paid him any money as such, and he never received any money in such a capacity.

SIXTH POINT.

The complainant is entitled to interest on its recovery from January 11th, 1890.

The record shows that the $75,000 had been taken from the treasury of the company by January 11th, 1890 (Ex. 98, Rec. 286).

The complainant whether entitled to recover $15,000, $22,500, or $75,000 from Harris' Estate was entitled to interest on the amount from that date.

For some reason not disclosed, either in the opinion or the decree of the United States Circuit Court for the District of Vermont, the court allowed interest only from October 17th, 1901, the date of the handing down of the opinion (Rec. 194).

It is fundamental that interest follows as a matter of course in a case of this sort.

When money has been wrongfully obtained or retained by a party he is liable to account for it with interest from the date it was wrongfully obtained or retained.

Simpson vs. Feltz, 1 McCord Eq. 213.
Rapalje vs. Emory, 1 U. S. (1 Dall) 349.
Hawkins vs. Johnson, 4 Blackf. 21.
Hazard vs. Duke, 64 Ind. 220.
Wood vs. Robbins, 11 Mass. 504.
Jefferson City Sav. Assn. vs. Morrison, 48 Mass. 273.
Holden vs. N. Y. & Erie Bank, 72 N. Y. 286.
Trustees, etc., vs. Lawrence, 11 Paige, 80.
Barr vs. Haselton, 10 Rich. Eq. 53.

SEVENTH POINT.

Equity had jurisdiction of the bill.

It may be that it will be again claimed that the suit is not one of equitable cognizance.

The United States Circuit Court of Appeals ignored this defense. If it is so contended, it is enough to say: (1) The directors occupied a fiduciary capacity and held the funds in trust. (2) The cases heretofore cited were suits in equity against directors for fraud, and to charge them as such for funds or property misappropriated. (2) Briggs vs. Spaulding, 141 U. S. 132, which was a suit simply for negligence of directors of a national bank, was decided by this court and the jurisdiction unquestioned.

The suit at bar was one in which the defendant Harris was charged not only with negligence and mismanagement of the corporation to its damage (which has been abandoned) but with the misappropriation and fraudulent conversion of actual property and assets which came into his hands as an officer and director of the corporation.

National Bank of Commerce vs. Wade, 84 Fed. 10.
Cockerell vs. Cooper, 86 Fed. 7.
Robinson vs. Hall, 43 Fed. 222.

(3) Dykeman vs. Kieney, 154 N. Y. 490, following O'Brien vs. Fitzgerald, 150 N. Y. 572, on which respondents relied, while not agreeing with this court in Briggs vs. Spaulding, as to the jurisdiction in equity of a suit to recover losses sustained by negligent conduct of directors, nevertheless recognize that a suit in equity lies against directors for an accounting as to assets to and of which they had title and possession, and clearly brings out the distinction between a suit in equity by a corporation or its receiver against its delinquent directors, to compel them to account for damages due to a negligent or other tortious act *unattended with profits to such directors*, and one for misappropriation of property of the corporation to their own use. They held that in the former case equity had no jurisdiction, the remedy being at law, that in the latter such jurisdiction did exist.

EIGHTH POINT.

The decree of U. S. Circuit Court of Appeals for the Second Circuit should be reversed, and also the decree of the United States Circuit Court for the District of Vermont, and the cause remanded with directions to enter a decree in favor of petitioner charging defendants with $75,000 with interest from January 11th, 1890.

Respectfully submitted,

HARLAN CLEVELAND,
Of Counsel for Petitioner.